



OFFICE OF THE
COMMISSIONER OF RAILROADS
STATE OF WISCONSIN

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Public Service Commission of Wisconsin
RECEIVED: 07/26/16, 11:27:05 AM

DATE

9164-RX-842

Re: Complaint of the City of Thorp for the Repair of the Public Crossing of the Wisconsin Central Ltd. Tracks with N. Cemetery Street in the City of Thorp, Clark County

To The Person Addressed:

Enclosed with this letter you will find the Proposed Final Decision of the Administrative Law Judge. This proposed final decision is the administrative law judge's recommendation and not the final decision of the Commissioner of Railroads (OCR). The Commissioner will issue a final decision only after considering any written comments on the proposed decision.

Comments, either in support or in opposition, must be filed electronically or in writing in time to reach the OCR not later than 15 days from the date of this letter. Any person or group shall file one comment using the ERF system. To file a comment, go to the OCR's web site at <http://ocr.wi.gov> and click on the "Public Comments" at the top of the page and select correct docket. Docket parties should file comments through ERF. Generally, "parties" include those persons and organizations listed in the "Appearance" section of the proposed final decision (but not including any members of the OCR staff).

This 15-day period is your opportunity to file any comments on the proposed final decision. Comments need not follow any particular format nor do they need to be elaborate. A clear, concise and specific explanation of your comments is sufficient and helpful. Short extensions may be granted upon request in writing or by telephone.

Sincerely,

/s/ Dave Albino

Dave Albino
Administrative Law Judge
Enclosure

BEFORE THE OFFICE OF THE COMMISSIONER OF RAILROADS

STATE OF WISCONSIN

Complaint of the City of Thorp for the Repair of the Public Crossing of the Wisconsin Central Ltd. Tracks with N. Cemetery Street in the City of Thorp, Clark County

9164-RX-842

PROPOSED FINAL DECISION

This is the Final Decision in this Class 1 proceeding conducted by the Office of the Commissioner of Railroads (Office) on the complaint by the city of Thorp that the Wisconsin Central Ltd. (WCL) has failed to maintain in good condition for public travel the public crossing of its tracks in the city of Thorp.

Introduction

On July 15, 2015, the city of Thorp filed a complaint with the Office under Wis. Stat. § 86.12 alleging that the WCL has failed to maintain in good condition for public travel the public crossing of its tracks with N. Cemetery Street in the city of Thorp, Clark County (Crossing No. 692845C). Wisconsin Stat. § 86.12 requires railroad companies to repave and repair the area between their tracks and the area within four feet of their tracks at a crossing. The necessary work is to be done at the expense of the railroad company.

Pursuant to due notice, the Office held a public hearing in Thorp before Administrative Law Judge Douglas S. Wood. The list of parties and interested persons appear in Appendix A.

Findings of Fact

1. N. Cemetery Street is 26 feet wide and intersects the tracks at an angle of 90 degrees. The roadway approaches to the crossing are level. The crossing consists of one main line track and one passing track.
2. N. Cemetery Street carried 250 ADT (average daily traffic) according to DOT records. The speed limit on N. Cemetery Street is 25 mph.
3. The railroad currently operates about 8 through train movements per day over the crossing

location at a maximum speed of 40 mph.

4. The crossing surface is constructed with timber-plank and asphalt.
5. The crossing was fully renewed in 2002. There are no loose panels, and no bouncing of vehicles as they traverse the crossing.
6. The main line track and the passing track are on the same plane. The asphalt between the rails has been ground down to match the level of the rails.
7. Bad timbers were replaced in November of 2014.
8. There will be a tie replacement program on this subdivision within 5 years.
9. The Wisconsin Central Ltd. has adequately maintained the crossing at-grade of N. Cemetery Street with its tracks in good condition and repair for public travel in the City of Thorp, Clark County.

Conclusions of Law

1. Wisconsin Central Ltd is a railroad as defined in Wis. Stat. § 195.02(1).
2. The Office has authority under Wis. Stat. §§ 86.12, 189.02, 195.03, 195.04, 195.06, 195.28, 195.285, 195.29, 195.30, Wis. Stat. § 227.47(1), and Wis. Admin. Code §§ RR 1.14 and 1.15, to issue this decision.

Opinion

On June 8, 2015, the city of Thorp passed Resolution 2015-06-1. ([PSC REF#: 282200](#)) The Resolution stated that “the N. Cemetery St. crossing is not in good condition and repair for public travel due to misalignment of street, approach and railroad bed due to excessive and cumulative heaving due to weather and predominant soil conditions”. The city of Thorp proposed that “... the Canadian National Railroad pave, plank, repair, change or otherwise improve the crossing, as the needs require...” The June 2015 Resolution is the city’s second attempt to get the crossing repaired, having passed a similar resolution in the fall of 2013.

At the hearing, the city stated that the rough ride for vehicle passengers is caused by uneven timbers--the timbers are higher than the rails. N Cemetery Street is stated to be a preferred truck route as one of two points of ingress and egress from the industrial park on the north side. The city also stated there have been complaints from individuals over the condition of the crossing. Two complaints dated October 26, 2015 ([PSC REF#: 282193](#)) and November 30, 2015 ([PSC REF#: 282192](#)) state that the crossing is hard on vehicles; one undated complaint states that the timbers are out of place and elevated above the road surface. ([PSC REF#: 282194](#))

The railroad states that the crossing was fully renewed in 2002. A "full renewal of an at-grade crossing" means complete reconstruction from the subgrade up. Major elements include the removal and disposal of the existing crossing surface and the track; excavation and removal of the existing ballast (and possibly excavation below the ballast, depending on the conditions discovered when the crossing is opened up); placement of filter fabric and possibly perforated drain pipe (as needed); complete track reconstruction; and, placement of a new crossing surface.

A crossing typically can have a functional lifespan of 15 to 20 years. Although the N. Cemetery Street crossing is reaching the end of its lifespan, the railroad states that some bad timbers were replaced in November of 2014. The witness for the railroad testified that she saw no loose panels, and no bouncing of vehicles as they traverse the crossing. The main line track and the passing track are on the same plane. The asphalt between the rails has been ground down to match the level of the rails. ([PSC REF#: 282199](#)) There will be a tie replacement program on this subdivision within 5 years.

Wisconsin Stat. § 86.12 requires the railroad to keep the surface of the crossings between the tracks and rails and extending four feet on either side of the outside rails, in 'good condition and repair' for highway travel. Similarly, Wis. Stat. § 86.13 requires the railroad to maintain in 'good and safe condition for public travel' the portion of such street or highway extending across said track. However, Wis. Stat. ch

86 does not define either ‘good condition and repair’ or ‘good and safe condition’. Nor is there an accepted definition of what is meant by either phrase in the context of public railroad-highway crossing surfaces.

The Federal Highway Administration’s (FHWA) Bridge Preservation Guide¹ defines a similar phrase, ‘state of good repair’, as “[a] condition in which the physical assets, both individually and as a system (a) are functioning as designed within their useful service life; and, (b) are sustained through regular maintenance and replacement programs”.² Applying this characterization to public crossings would mean: that the existing physical conditions of crossing surfaces on both local and state trunk roadways are (a) functioning as designed; (b) within their useful service life; and, (c) sustained through regular maintenance and replacement.

The American Railway Engineering and Maintenance-of-Way Association Manual for Railway Engineering recommends that the surface of a highway-rail grade crossing be in the same plane as the top of the rails for a distance of two feet outside of the rails. The witness for the railroad testified that such was the case at the N. Cemetery Street crossing.

As the complaining party in this proceeding, the city has the burden of proof, including not only the burden of going forward but also the burden of persuasion. See *Sterlingworth Condo. Ass’n, Inc. v. State, Dep’t of Nat. Res.*, 205 Wis. 2d 710, 726, 556 N.W.2d 791, 796 (Ct. App. 1996). At the hearing, the city had to demonstrate that the railroad has not kept the crossing “in good condition and repair for highway travel”. This showing is often made using photos of the crossing with a ruler/tape measure if there is a difference in elevation between the rail and the roadway surface.

The photographic evidence presented at the hearing is at best, in equipoise, and, at worst, inconclusive. None of the photos show any measured height differences between the rail and the roadway

¹ FHWA Publication Number: FHWA-HIF-11042, “Bridge Preservation Guide: Maintaining a State of Good Repair Using Cost Effective Investment Strategies”, August, 2011.

² Id. at 10.

surface to make this a 'rough crossing'.

The crux of the city's argument is the presence of uneven timbers. The railroad responded that bad timbers were replaced in November 2014. The railroad testified that there have been no claims for damage related to the crossing. Additionally, the railroad witness' 30-minute personal observation of approximately 25 vehicles across the crossing, including one motorcycle, showed no swerving or slowing.

The city has failed to demonstrate that the railroad has not kept the crossing "in good condition and repair for highway travel". The Office dismisses the complaint without prejudice.

Order

1. The complaint by the city of Thorp against the Wisconsin Central Ltd. is dismissed.

2. The **Wisconsin Central Ltd.** shall continue to maintain the crossing at-grade of N.

Cemetery Street with its tracks in the City of Thorp, Clark County (Crossing No. 692845C / MP 319.98).

3. Jurisdiction is retained.



David Albino
Administrative Law Judge

DA:jg DL: 01297125

Appendix A

Appearances:

Parties

City of Thorp, Complainant
by
Randy Reeg, City Administrator
PO Box 334
Thorp, WI 54771

In Opposition:

As Interest May Appear:

Wisconsin Central Ltd.
by
Jackie Macewicz
Manager Public Works
1625 Depot Street
Stevens Point, WI 54481